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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **O.M.P. 552/2008**

Reserved on: 7th February, 2017
Decided on: 31st March, 2017

NATIONAL BUILDINGS CONSTRUCTION CORP. (NBCC) LTD. ..... Petitioner
Through: Mr. Manoj Kumar Dass, Advocate

versus

M/S NATAVARLAL M. PATEL ..... Respondent
Through: Ms Meenakshi Arora, Senior Advocate and Mr Vasav Anantharaman, Advocates

WITH

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Through: Mr. Manoj Kumar Dass, Advocate

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M/S NATAVARLAL M. PATEL ..... Respondent
Through: Ms Meenakshi Arora, Senior Advocate and Mr Vasav Anantharaman, Advocates

CORAM: JUSTICE S. MURALIDHAR

J U D G M E N T

% **31.03.2017**

Introduction

1. These are two petitions under section 34 read with section 28 of the Arbitration & Conciliation Act, 1996 by the Petitioner M/s National Building Construction Corporation ('NBCC') Ltd.

2. The challenge in OMP No. 552 of 2008 is to the common Award dated 10th July, 2008 passed by the Sole Arbitrator in the disputes between NBCC and the Respondent, M/s Natavarlal M. Patel, arising out of an Agreement dated 1st January, 2001 whereby the work of "Construction of Road Work of MP Pool Building and Allied Works at Civil Airport, Vadodara" (hereafter 'Road Contract') was awarded by NBCC to the Respondent.

3. The challenge in OMP No. 553 of 2008 is to the same common Award in so far as it relates to the disputes between the parties arising out of the Agreement dated 27th October, 1999 whereby the work of "Construction of MP Pool Building and Allied Works at Civil Airport, Vadodara" (hereafter the 'Construction Contract') was awarded by NBCC to the Respondent.

4. There were two separate references before the same Arbitrator. In the impugned Award dated 10th July, 2008 pertaining to the disputes arising out of the Construction Contract, the learned Arbitrator allowed the Claim Nos. 1, 2, 3 (a) to (d), 4, 5, 6 of the Respondent together with simple interest at 12% per annum from the date of filing the petition under Section 11 of the

Act till the date of payment apart from costs of Rs. 2 lakhs.

5. As regards the Award dated 10th July, 2008 in respect of the disputes arising out of the Road Contract, the learned Arbitrator allowed the Claim Nos. 1, 2 (a) to (c) and 3 to 6 of the Respondent together with simple interest at 12% per annum from the date of filing the petition under Section 11 of the Act till the date of payment apart from costs of Rs. 2 lakhs.

The Construction Contract

6. The background facts are that Petitioner invited tenders for the Construction of MP Pool Building and Allied Works at Civil Airport, Vadodara. The Respondent submitted its tender for the said work on 6th September, 1999. NBCC then issued a Letter of Intent ('LOI') / Work Order ('WO') in favour of the Respondent awarding it the said work for a total value of Rs. 38.97 lacs. An Agreement i.e., the Construction Contract was entered into on 27th October, 1999. In terms thereof, the date of start of work was 21st October, 1999. The completion period was 9 months expiring in July, 2000. NBCC claims that time was of essence to the Contract.

7. It is stated that the Respondent commenced the work on the stipulated date but could not complete it by 31st July, 2000. NBCC then granted an extension of time ('EOT') for the completion of the work till 15th January, 2001. This EOT was "without imposition of the penalty and without escalation". It is stated that the Respondent completed the work on 15th January, 2001.

8. On 8th February, 2001, NBCC by letter dated 8th February, 2001 had asked

the Respondent to submit proper documents / evidence in compliance of Clause 17 (Insurance), Clause 19 (Third Party Insurance) & Clause 23.2 (EPF Contribution) etc. It is stated that in April 2001, the Respondent submitted its final bill which was finally prepared / passed by NBCC and was signed by the Respondent by way of acceptance on 31st August, 2001.

9. In terms of the said final bill, a sum of Rs. 7,40,793 was payable to the Respondent. According to NBCC, the said amount was, however, not released to the Respondent on account of the failure of the Respondent to fulfil its part of the contractual / statutory obligation as per Clause 13 (non-payment of levies, taxes, duties) etc., Clause 19 (third party insurance for damages/loss/injury), Clause 23 (observance of labour laws, EPF contribution), Clause 29 (bill of materials in respect of extra items). By letter dated 6th September, 2001, NBCC again asked the Respondent to submit proper documents. A reminder was sent on 13th October, 2001.

10. On 26th December, 2001, NBCC wrote to the Respondent pointing out that cracks had developed in the floors and called upon the Respondent to rectify the defects. By letter dated 15th March, 2002, NBCC asked the Respondent to furnish statement of material, cement being consumed, paint, reinforcement, etc. The Respondent by letter dated 1st August, 2002 intimated NBCC that the maintenance period was over on January 2002 and requested for release of the following payments:

(i)	Final bill	-	Rs.2,06,805/-
(ii)	Withheld amount	-	Rs.1,99,300/-

(iii) Security Deposit - Rs.2,34,628/-

11. By a further reminder dated 20th August, 2003 and 23rd December, 2003, the Respondent requested NBCC to release the aforesaid dues. By letter dated 1st January, 2004 addressed to the Chairman, NBCC, the Respondent raised several claims in the aggregate sum of Rs. 30 lakhs which included the aforementioned claims of Rs. 6.40 lakhs. These claims were for compensation / damages, claim for overhead, loss of profitability, over stay of tools, plants and machinery, rise in the price of labour, materials etc. Following this, on 23rd February, 2004, the Respondent invoked the arbitration clause and sought the appointment of an arbitrator. In terms thereof, NBCC appointed Shri A K Gupta, DGM, as a Sole Arbitrator.

12. The Respondent filed a petition under Section 11 of 1996 Act before this Court seeking the appointment of an independent Arbitrator. By judgment dated 10thAugust, 2004, this Court appointed a former Judge of this Court as Sole Arbitrator to adjudicate the disputes between the parties.

13. On 1st November, 2004, the Respondent filed a Statement of Claim (SOC), raising the following claims:

Claim No.	*Description of Claim*	*Amount (Rs.)*
1.	*Work done*	*4,22,220.00*
2.	*Security Deposit*	*2,34,628.00*
3A.	*Overhead*	*2,59,055.00*
3B.	*Profitability*	*2,80,484.00*

3C.	*Overstay of tools, plants, machineries*	*6,41,591.00*
3D.	*Rise in price of labour, material and petroleum*	*2,23,607.07*
4.	*Delay in payment*	*2,61,804.00*
5.	*Interest*	
6.	*Arbitration Cost*	*5,00,000.00*

14. This case was registered as Case No. 92/2004 before the learned Arbitrator. On 5th January, 2005, NBCC filed its counter statement. *Inter alia* it was pointed out that the claims were time barred and not maintainable as per the Contract and law.

Road Contract

15. Now turning to the Road Contract, the work was to commence on 24th December, 2000 and was to be completed within three months i.e., stipulated by 23rd March, 2001. NBCC granted EOT for completion of work till 31st July, 2001. The letter granting such EOT was, however, issued later i.e., on 28th January, 2002. The EOT was granted "without imposition of the penalty and without escalation". The work was actually completed on 31st July, 2001.

16. NBCC by letter dated 6th September, 2001 asked the Respondent to submit proper documents in compliance with Clause 17 (insurance), Clause 19 (third party insurance and work insurance) and Clause 23.2 (EPF contribution), sale tax deposit challan, Royalty and octroi papers, labour payment clearance, deviation statement for further payments.

17. By letter dated 13th October, 2001, the Respondent was intimated about

the defects in the brick work of the drain and asked it to be rectified. Reminders in this regard were also sent on 26th December, 2001 and 22nd January, 2002. A reminder was also sent by NBCC to the Respondent on 15th March, 2002. Reminders regarding rectification of the defects were sent on 1st July, 2002, 29th July, 2002 and 31st July, 2002.

18. The Respondent by letter dated 1st August, 2002 intimated NBCC that the maintenance period was over and asked for release of the Security Deposit of Rs. 5,70,472. The Respondent sent reminders dated 16th April and 18th July, 2003. By another letter dated 20th August, 2003 to the CMD NBCC, the Respondent reiterated its request.

19. By its letter dated 16th January, 2004 to the CMD, NBCC, the Respondent raised several claims for a total sum of about Rs. 55 lakhs which included security deposits, other claims for overheads, loss of profitability, over stay of tools plants and machinery, rise in price of labour material etc., apart from interest. The Respondent issued NBCC a notice dated 23rd February, 2004 invoking the arbitration clause and seeking the appointment of an Arbitrator in terms of the Arbitration Clause in the Contract. The CMD, NBCC appointed Shri A K Gupta, DGM, a Sole Arbitrator.

20. On 10th August, 2004, Respondent filed a petition under Section 11 of the Act for the appointment of an independent Arbitrator by the Court. In the said petition, this Court by judgment dated 10th August, 2004 appointed a former Judge of this Court as Sole Arbitrator to adjudicate the disputes

between the parties.

21. On 1st November, 2004, the Respondent filed its SOC raising the following claims:

Claim No.	*Description of Claim*	*Amount (Rs.)*
1.	*Security Deposit*	*5,20,472.00*
2a.	*Overhead*	*11,17,537.00*
2b.	*Profitability*	*12,98,169.00*
2c.	*Overstay of tools, plants, machineries*	*5,07,875.00*
2 d.	*Rise in price of labour, material and petroleum*	*2,24,345.07*
3.	*On account of price increase in cement*	*11,82,150.00*
4.	*Delay in payment*	*1,40,023*
5.	*Interest*	*@12%*
6.	*Arbitration Cost*	*5,00,000.00*

22. NBCC filed its reply statement and counter-claims on 8th January, 2005. *Inter alia* it was stated that the claim was time-barred and not maintainable as per the Contract and law.

Impugned common Award

23. By the impugned common Award dated 10th July, 2008 in respect of both the Construction Contract and the Road Contract, the claims of the Respondent were awarded by the learned Arbitrator in the following manner:

In the claims arising out of the Construction Contract (Case No. 92/2004):

(1) For the work done but not paid: Rs. 4,22,220 with interest @ 18% per annum from 17th April, 2001 till 10th July, 2008 and further till the final payment.

(2) Security Deposit: Rs. 2,34,628 with interest @ 18% per annum from January 15, 2002 to July 10, 2008 and further till the final payment.

(3) Payment towards overheads: Rs. 2,59,055 with interest @ 12% per annum
from March 27, 2004 till July 10, 2008 and further till the final payment.

(4) Loss of Profitability: Rs. 2,80,484 with interest @ 12% per annum from March 27, 2004 till July 10, 2008 and further till the final payment.

(5) Overstay of Tools, Plants & Machinery: Rs. 6,41,591with interest @ 12% per annum from March 27, 2004 till the July 10, 2008 and further till the final payment.

(6) Rise in prices of labour, material and Petroleum: Rs. 2,23,607 with interest @ 12% per annum from March 27, 2004 till July 10, 2008 and further till the payment.

(7) Delay in the payment contrary to the provisions of the Contract: Rs. l,96,257 with interest @ 18% per annum from 2nd January, 2004 till 10th July, , 2008 and thereafter till payment.

(8) Arbitration Cost: Rs. 2 lakhs.

(9) Reimbursement of the amount paid under Section 38 of the Arbitration Act: Rs. 12,500.

(10) Cost for the hearing on July 10, 2008: Rs. 12,500.

In the claims arising out of the Road Contract (Case No. 93/2004):

(1) Security Deposit: Rs. 5,20,472 with interest @ 18% per annum from 31st July, 2002 till 10th July, 2008 and thereafter till the final payment is made.

(2) Overheads: Rs. 11,17,537 with interest @ 12% per annum from 27th March, 2004 till 10th July, 2008 and thereafter till the final payment is made.

(3) Profitability: Rs. 12,98,169 with interest @ 12% per annum from 27th March, 2004 till 10th July, 2008 and thereafter till final payment is made.

(4) Overstay of Tools, Plant & Machinery: Rs. 5,07,875 with interest @ 12% per annum from 27th March, 2004 till 10th July, 2008 and thereafter till the final payment is made.

(5) Increase in price of cement: Rs. 11,82,150 with interest @ 12% per annum from 27th March, 2004 till 10th July, 2008 and thereafter till the final payment is made.

(6) Delay in Payment: Rs. 1,40,023 with interest @ 18% per annum from 17th January, 2004 till 10th July, 2008 and thereafter till the final payment is made by the Respondent.

(7) Rise in price of labour, material and petroleum: The claim was not pressed by the counsel for the Claimant during the hearing and hence, rejected.

(8) Arbitration Cost: Rs. 2 lakhs.

(9) Cost of the hearing on July 10, 2008: Rs: 12,500.

Submissions of counsel for NBCC

24. Mr. Manoj Kumar Dass, learned counsel appearing for NBCC, submitted as under:

(i) The claim of the Respondent in respect of the Construction Contract was

time-barred. The work stood completed on 31st July, 2001. The claims had to be raised within 3 years thereafter i.e., by 31st July, 2004. The claims were in fact filed only on 1st November, 2004 i.e., beyond the period of limitation. Reliance is placed on the decision of ***Natwar Lal Shamal Das v. MMTC (2002) DRJ (64) 354 (DB)*** wherein it was held that even if on the date of filing of the petition under Section 20 of the Arbitration Act 1940, the claims were within time, the claims filed subsequently before the Arbitrator would be time-barred.

(ii) The learned Arbitrator erred in law in entertaining and awarding Claim Nos. 2 (a), (b), and (c), and Claim (4) concerning the construction work. It is contended that the said claims were not arbitrable after acceptance of the final bill by the Respondent, without any objection. From the letters written by the Respondent, it was plain that the Respondent was claiming refund of only the security deposit. No claim was raised for escalation, damages, rise in prices or loss of profitability. Therefore, the above Claim Nos. 2 (a), (b), (c), and Claim Nos. 3, 4 and 5 could not have been referred to arbitration. It also disentitled the Respondent for relief on the principle of waiver and estoppel. Reliance is placed on the decisions in ***Union of India v. Popular Builders, Calcutta (2000) 8 SCC 1*** and ***R K Ramaiah v. CMD, NTPC 1994 Supp 3 SCC 126***. It is contended that in similar situation the Supreme Court set aside the claims awarded by the Arbitrator which were filed after acceptance of the final bill by the claimant / Contractor without any objection.

(iii) Likewise, with regard to the Road Contract, the learned Arbitrator erred

in entertaining and awarding Claim Nos. 3(a), (b), (c) and (d) and Claim No. 4 on account of non-arbitrability and being preferred after signing of the final bill on 31st August, 2009 without objection. In terms of the final bill, the Respondent was claiming only Rs. 6,40,793/-

(iv) The learned Arbitrator erred in awarding all the claims in its totality without any evidence or record. The total value of the Road Construction Work was Rs. 78.88 lakhs, out of which, admittedly, all the amounts were released except the security deposit of Rs 5,20,472. Under the Final Bill, the Respondent claimed outstanding sum Rs. 5.20 lakhs throughout from 2002 till 2004. It was contended that the claims raised by the Respondent in both the claims was inflated. A similar issue of inflated claims was dealt with by the Supreme Court in ***State of J&K v. Dev Dutt Pandit 1997 (7) SCC 339***.

(v) Time was the essence of the Contract. Consequently, the learned Arbitrator erred in holding that Section 55 paragraph 2 of the Indian Contract Act, 1872 ('ICA') applied and not paragraphs 1 and 3 thereof. It was erroneously held that no notice was required to be given by the Respondent to NBCC while applying for EOT in the format provided by the Respondent. The above finding is based on an erroneous application of law being contrary to mandate of S. 55 of the ICA. The Award is also contrary to S. 28 of the Act. The impugned Award in respect of Claim No. 2 is, therefore, required to be set aside and Claims Nos. 3 (a) to (d) arising from the Construction Contract are also required to be set aside.

(vi) Reliance is placed on ***G M Northern Railways v. Sarvesh Chopra (2002) 4 SCC 45*** to urge that issuance of a notice by the Contractor under S. 55 ICA was mandatory. Further, reliance is placed on the observations in ***Kailash Nath & Associates v. NDMC 2002 (3) Arb LR 631 (DB)*** in this regard. The Respondent was estopped from claiming compensation for rise in price of labour, material and that too three years after the completion of the work, having accepting the conditional extension of time granted by the Petitioner and carrying out the work in the extended period without demur. Assuming, though not admitting, that the delay was on the part of NBCC, even then the Respondent is not entitled to raise any claim on account of price rise in view of the prohibition in Clause 72.4 of the Contract (vi), which reads thus:

> "72.4- Delay by NBCC / Owner or their Authorised Agents – In case the Contractor's performance is delayed due to any act or omission on the part of the Owner or his authorized agents, then the Contractor shall be given due to extension of time for the completion of the work, to the extent such omission on the part of the Owner has caused delay in the Contractor's performing of his work. No adjustment in Contract price shall be allowed for reasons of such delays and extensions granted ... "

(vii) Claim No. 2 (c) in respect of Road Contract and Claim No. 3 (c) in the Construction Contract was on account of over stay of tools plants and machinery etc. It is submitted that Claim No. 2 (c) is an afterthought and after three years of the completion of the work. There was no evidence placed on record by the Respondent in support of the said claims.

(viii) The finding in paragraph 23 of the Award that NBCC "neither disputed

the existence of machinery nor rental value as stated in the letter" was contrary to the record and perverse. In reply to Claim No. 2, NBCC had categorically denied the machinery and rental value and disputed the alleged loss. The Respondent had not suffered any loss on account of delay and as such they are not entitled to a sum claimed under Claim Nos. 2 (a) to (c) or any part thereof. Reliance was placed on ***Kochar Construction Co. v. Union of India 1994 (1) Arb LR 269*** wherein it has been held thus:

> "We find ourselves in total agreement with the reasoning of the learned Single Judge in this behalf. In the facts and circumstances of the case mere filing of cost analysis cannot be accepted as the evidence of expenditure on account of increased cost of construction even if the cost analysis was not traversed by the respondent."

(ix) It is submitted that the grant of the claim towards loss of profit and interest thereon was unwarranted. There was no material on record available before the learned Arbitrator in support of such claim except a mere self-serving statement issued by the Respondent in its letter of invocation. Reliance is placed on the observations in ***BCCL v. L K Ahuja (2004) 5 SCC 109***.

(x) The learned Arbitrator exceeded his jurisdiction by awarding damages contrary to Section 73 of the ICA. If a party wished to invoke Section 73, it had to establish before the Arbitrator the actual amount suffered by it. In the absence of any evidence on record or any agreement between the parties on the applicability of formula for computing the damages, as in the instant case, the Contractor would not be entitled to any payment in this behalf.

(xi) The Respondent failed to fulfil its obligation in respect of Clauses 13, 19, 23 and 29. Consequently, the Respondent was not entitled to any interest on any of the claims under both references. The Arbitrator erred in ignoring the breaches made by the Respondent. The learned Arbitrator mixed up two different issues viz., satisfactory work and the compliance of statutory and other obligations under the Contract.

(xiii)The learned Arbitrator erred in not appreciating that in the absence of any evidence on record or agreement between the parties, the question of applicability of any formula for computing the damages did not arise. Admittedly, no documentary evidence in respect of the work was filed except the statement with the letter dated 16th January, 2004, which in any event could not be considered to be documentary evidence. Likewise, the list of machinery, plants etc. could not be termed as documentary evidence.

(xiv) Also, as regards anticipated profitability, the mere assertion in the communication cannot constitute documentary evidence of proof of loss of profitability.

(xv) There were inherent inconsistencies and contradictions in the impugned common Award. The learned Arbitrator in page 30 (paragraph G) of the Award held as under:

> "if the respondent was not satisfied with this documentary evidence (in computation of damages), on record or its detail, it was open for the respondent to cross examine the claimant by oral evidence. The respondent has failed to do it. It is really

> strange that without pleading and without putting the evidence of the claimant on test by cross examination, the respondent is crying to snatch the straw of the court decision to reject the claim of the claimant".

The above finding was inconsistent with the finding recorded in paragraph 2 of the Award wherein the learned Arbitrator recorded the agreement of both the parties "not to record oral evidence in the proceeding" and "the award would be rendered by Arbitrator on the basis of pleadings, documents and arguments of the counsel for the parties". Therefore, the whole basis for awarding claim for damages is totally wrong and unsustainable in law.

(xvi) As regards grant of pre-suit interest in the Award pertaining to the construction work, it was submitted that interest, if at all, could be awarded only from the date of determination of damages and not from any prior date. Reliance was placed on the decisions in ***Krishna Bhagya Jal Nigam Ltd.*** **v** ***G. Harishchandra Reddy (2007) 2 SCC 720*** and ***Om Prakash Gita Devi & Co. v. Food Corporation of India 2001 (Suppl) Arb LR 4 (SC)***. As regards the claim for damages being untenable, reliance was placed on the decisions in ***ONGC v. Wig Brothers 2010 (4) Arb LR 375 (SC)***; ***BSES Rajdhani Power Limited v. Ranjit Singh Rana & Anr.*** (decision dated 21st January, 2010 in OMP No. 35 of 2003)***; Kochar Construction Co. v. Union of India 1994 (1) Arb LR 269***; ***NBCC v. H.S. Namdhari*** (judgment dated 15th April, 2015 in OMP No. 171/2013) and ***Sikkim Subba Associates v. State of Sikkim 2001 (5) SCC 629***.

Submissions on behalf of the Respondent

25. In reply, it is submitted by Ms. Meenakshi Arora, learned Senior Counsel appearing for the Respondent, as under:

(i) The scope of interference by the Court with the impugned Award in exercise of its powers under Section 34 of the Act was limited. Reliance is placed on the decisions in ***Associated Builders v. DDA (2015) 3 SCC 49*** and ***NHAI v. ITD Cementation (2015) 14 SCC 21***.

(ii) Time was in fact not the essence of the Contract as was apparent from the fact that the EOTs granted were retrospective. For instance, the EOT up to 31st July, 2001 was by a letter dated 28th January, 2002 and that too without penalty and escalation. It is submitted that paragraphs 1 and 3 of Section 55 of the ICA would not, therefore, apply. Reference is made to the decision in ***McDermott International v. Burn Standard Co. (2006) 11 SCC 181*** and ***Hind Construction Contractors v. State of Maharashtra (1979) 2 SCC 70***.

(iii) Reference is also made to the decision in ***Arosan Enterprises Ltd v. Union of India (1999) 9SCC 449*** to submit that it is primarily for the Arbitrator to interpret the terms of a Contract. Unless the interpretation is such that no fair-minded or reasonable person would adopt, the Court would not interfere.

(iv) It is sufficient that the reasons that weighed with the Arbitrator, howsoever brief, reflected the thought process that led to a particular conclusion. Reliance was placed on the decision in ***Som Datt Builders v. State of Kerala (2009) 10 SCC 259***.

(v) The mere acceptance of the final bill would not amount to a waiver of the right to claim damages. Reliance is placed on the decisions in ***Bharat Coking Coal v. Annapurna Construction (2003) 8 SCO 154***; ***Durga Charan Rautray v. State of Orissa (2012) 12 SCC 513***; ***Union of India v. Master Construction Company (2011) 12 SCC 349*** and ***National Insurance Company Ltd. v. Boghara Polyfab Private Limited (2009) 1SCC 467***.

(vi) In the absence of an express bar under the Contract, a claim for escalation can be maintained notwithstanding that EOT may have been granted without escalation. Reliance was placed on the decision in ***K.N. Sathyapalan v. State of Kerala (2007) 13 SCC 43***; ***Food Corporation of India v. A.M. Ahmad &Co (2006) 13 SCC 779***; ***Salwan Construction Company v. Union of India (1977) 13 DLT 12; Commissioner, Transport v. BSC-C&C JV, 2016 Lawsuit (Del)***.

(vi) The question of limitation is a mixed issue of law and fact. A categorical finding has been returned by the learned Arbitrator in the impugned Award that the claims were within time. The earliest of the letters sent by the Respondent to NBCC raising the claims was within a period of three years from the date of completion of the work. The parties were in negotiation even after the Completion Certificate was issued. In the Construction Contract, no final bill was prepared. The Arbitrator was, therefore, right in rejecting NBCC's plea of the claims being barred by limitation.

(vii) On the aspect of escalation, reference is made to Completion Certificate dated 13th March, 2001 issued by NBCC which gives value as per the work executed of Rs. 47 lakhs with the remarks, 'Final Bill Under Preparation'. The certificate categorically stated that the Contract had been completed successfully and the delay in completion of the work was beyond the control of the Contractor. It was for this reason that the learned Arbitrator found no justification in the withholding of the amount payable to the Respondent. Further, a no-claim certificate had not been issued by the Respondent to NBCC. The learned Arbitrator rightly found that the Respondent had not waived off its rights in the present case.

(viii) As regards overhead loss of profits, the learned Arbitrator adopted that Hudson Formula which was held by the Supreme Court decision in ***McDermott International v. Burn Standard Co*** (*supra*) to be a reasonable basis.

(ix) Detailed reasons have been given for the grant of interest and, therefore, no interference was called for even on that score.

Scope of the Court's powers under Section 34 of the Act

26. At the outset, it requires to be noted that the powers of the Court to interfere with the Award under Section 34 of the Act are limited. The legal position has been explained in several decisions of the Court. Reference required to be made only to the decision in ***Associated Construction v***

Pawanhans Helicopters Limited (2008) 16 SCC 128 where it was observed:

> "17. It must also be borne in mind that a court does not sit as one in appeal over the award of the arbitrator and if the view taken by the arbitrator is permissible no interference is called for on the premise that a different view was also possible. We also feel that in commercial transactions all situations cannot be visualised and the positive and unchallenged finding in the present case is that the delay in the execution of the work was occasioned on account of reasons attributable to Pawanhans. It cannot, therefore, be said that the award of the Arbitrator was so 'unconscionable that it required interference."

27. In ***Associate Builders v. Delhi Development Authority*** (*supra*), the Supreme Court emphasised that on questions of fact, the view of the learned Arbitrator would be final. The following observations in the said decision are relevant:

> "It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrator's approach is not arbitrary or capricious, then he is the last word on facts. "

28. In ***NHAI v. ITD Cementation India Limited*** (*supra*), it was observed as under:

> "25. It is thus well settled that construction of the terms of a Contract is primarily for an arbitrator to decide. He is entitled to take the view which he holds to be the correct one after considering the material

before him and after interpreting the provisions of the Contract. The court while considering challenge to an arbitral award does not sit in appeal over the findings and decisions unless the arbitrator construes the Contract in such a way that no fair minded or reasonable person could do."

29. In ***Associate Builders v. Delhi Development Authority*** (*supra*), the Supreme Court summarised what constituted the fundamental policy of Indian law. In that process, it extracted certain passages from the earlier decision in ***ONGC Ltd. v. Western Geco International Ltd., 2014 (9) SCC 263***. In paragraph 40 of that judgment, it was observed as under:

> "40. It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an Arbitral Tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest."

Limitation

30. The first issue that requires to be discussed is limitation. The case of NBCC is that the claims of the Respondent were made more than three years after the completion of the work i.e., on 15th January, 2001 in the Construction Contract and on 31st July, 2001 in the Road Contract. It is pointed out by NBCC that although the petition under Section 11 of the Act was filed on 27th March, 2004, the claims were filed only on 1st November,

2004.

31. The learned Arbitrator has in the impugned Award negated the plea of NBCC. What weighed with the learned Arbitrator was the fact while that the Completion Certificate was issued in respect of the Construction Contract on 15t March, 2001 but the letter granting EOT till that date without penalty and escalation was issued much later on 28th January, 2002. No final bill was prepared. As regards the Road Contract, the Completion Certificate and final bill were both issued on 31st July, 2001. The final bill of that date was paid only on 6th November, 2011.

32. Indeed, it is seen that as far as Construction Contract was concerned, the Completion Certificate was issued on 13th March, 2001 but EOT up to the actual date of completion i.e., 15th January, 2001 was issued only on 28th January, 2002. In fact, no final bill was prepared. The arbitration clause was invoked by the notice dated 23rd February, 2004. As far as the Road Contract was concerned, the Completion Certificate and final bill were both issued on 31st July, 2001. The date of invocation of the arbitration clause would be the date of the commencement of the arbitration proceedings in terms of Section 21 of the Act. Going by that date, clearly, the invocation of arbitration clause by the Respondent in both Contracts was within limitation.

32. The Court, accordingly, finds no legal infirmity in the impugned Award inasmuch as the plea of NBCC that the Respondent's claims were barred by limitation have been negatived.

NBCC fails to place materials before the Arbitrator

33. The learned Arbitrator has in the impugned Award observed that there were no facts and figures placed by NBCC. The learned Arbitrator examined the sum withheld by NBCC in the Construction Contract i.e., money due for work done which was Rs. 4,22,220. Further, in both the Contracts, the security deposit was not returned. In the Construction Contract, the security deposit was Rs. 2,34,628/- whereas in the Road Contract, it was Rs. 52,04,702/-.

34. The learned Arbitrator decided to take up these claims first but found that *"the Respondent's Counsel and the Engineer assisting him were not ready to commit to any figure in writing. On the contrary, they merely repeated the argument of non-compliance of the Contractual obligations by the Claimant"*. The learned Arbitrator made attempts to get the parties to sit together to sort out the disputes but to no avail. It was noted by the learned Arbitrator that the Respondent visited the office of NBCC for about 20 times and yet the issue could not be resolved. Finally, NBCC submitted before the learned Arbitrator a consolidated figure which was disputed by the Respondent by producing the documents on record. For e.g., the amount shown by NBCC as payable against 6th RA Bill was Rs. 14,99,199 whereas according to the Respondent, the balance amount was Rs. 2,22,941.75. Even as regards the amount shown as fixed deposit, while NBCC stated it as Rs. 4,47,140, according to the Respondent, it was Rs. 1,99,300. While the Respondent was able to substantiate each one of its figures, NBCC was not.

35. The second aspect which the learned Arbitrator adverted to was that NBCC had ample power under the clauses of the Contract to secure compliance. One such power was terminating the Contract which NBCC did not resort to. The second aspect was that in both the Contracts, NBCC issued Completion Certificates expressly stating that the work of the Respondent was 'satisfactory'.

36. NBCC sought to offer an explanation before the learned Arbitrator that it withheld the amount under Clause 73 of the Contract. This was negated by the learned Arbitrator in the following manner in paragraph 17 of the impugned Award:

> "17. The reliance on Clause 73 for withholding the said payments is totally misconceived and appears to be an "after-thought". At no stage during the continuation of the Contract or even thereafter, the Respondent had communicated to the Claimant the reasons for withholding the said payments relying on Clause 73 or otherwise. The invocation of Clause 73, even at this late stage, is completely wrong and untenable in law. The Clause presupposes that there are certain crystallized claims in money due from the Contractor, i.e. Claimant to the Respondent owner. Even during these proceedings, the Respondent has not specified any such crystallized dues in terms of money payable by the Claimant to the Respondent. As a matter of fact, if any such claims in money were due against the Claimants, the Respondent could have filed a counter claim for the said amount in these proceedings. No such counter claim is preferred. The Respondent's submission in terms of Clause 73 as a justification for withholding the sums for the work done and the security deposit, is untenable in law and is rejected."

37. As regards the withholding of the sums and the refund of the security deposit, the learned Arbitrator had no hesitation in ordering their payments to the Respondent in the manner claimed. The Court finds that this part of the impugned Award is based entirely on the evidence before the learned Arbitrator and cannot said to be perverse or shocking to the judicial conscience.

Submission merits

38. The Court next proceeds to examine one the contentions of the learned counsel for NBCC. It is pointed out that each of the EOTs was granted without penalty, but, at the same time, without escalation. His contention was that despite the Respondent having accepted the EOTs on the above condition, it continued to claim that the enhanced rates during the extended period.

39. The decisions in ***Kailash Nath & Associates v. New Delhi Municipal Committee***(*supra*); ***General Manager Northern Railway v. Sarvesh Chopra*** (*supra*) and ***Orissa Textile Mills Ltd. v. Ganesh Das Ramkrishun*** are distinguishable on facts and do not aid NBCC. As rightly pointed out, NBCC has not been able to counter the main findings of the learned Arbitrator that time was not the essence of the Contract. The very grant of EOTs by NBCC from time to time and with retrospective effect revealed that in fact time was not the essence of the Contract. As a result of an EOT, for reasons not attributable to the Contractor, the completion got delayed. Since each EOT is without penalty, it is at best NBCC and not the Respondent that is

responsible for the delay.

40. What happens when there is an EOT, particularly, when the Contractor is not responsible for the delay, is that the Contractor has to keep the machinery, tools and labour idle which he would have employed elsewhere. Further, the delay in payment of sums that became due meant that liquidity was under strain. The Contractor is then bound to seek loans to keep the work in progress. There is finding of fact in the impugned Award that EOT was granted not on account of extra work but because of hindrances caused by NBCC. It has been held that it was entirely on account of hindrances caused by NBCC that the EOTs were granted. This finding of fact has been unable to be dislodged by NBCC.

Notice under Section 55 ICA

41. It was contended by NBCC that the Respondent did not give it notice regarding claims for the idle machinery, tools and labour as required under Paragraph 3 of Section 55 of ICA. Here, the learned Arbitrator found that since time was not the essence of the Contract, it was paragraph 2 of Section 55 of ICA that would apply and not paragraph 3. Therefore, no notice was required to be given by the Respondent while seeking EOTs in the form provided in the Contract.

42. The learned Arbitrator has noted that the application for EOT set out the delay caused by any hindrances separately from the delay caused due to extra work. The Respondent was claiming damages only in regard to the delay

caused due to hindrances of the NBCC. As rightly noted by the learned Arbitrator, NBCC ought to have produced the contemporaneous evidence demonstrating therein that it was the Respondent who was responsible for the delays. On the other hand, NBCC merely quoted various clauses of the Contract and did not set out the required factual averments. It was also noted by the learned Arbitrator that in the letter granting EOT, it was not stated that it was being granted for extra work. The Completion Certificate categorically stated that the delay in completion of job was beyond the control of the Respondent.

Reasons for delay

43. The learned Arbitrator also discussed in considerable details the actual reasons for the delay in each of the Contracts. The learned Arbitrator noted the absence of material produced by NBCC to explain the delay in both the Contracts.

Reciprocal promises and damages

44. The other finding of the learned Arbitrator is that NBCC failed to fulfil the reciprocal promises in terms of Section 52 of the ICA. Sections 53 and 54 provided for compensation for losses suffered as a consequence of the non-performance of the reciprocal promises.

45. Thereafter, the learned Arbitrator discussed Section 73 of the ICA and noticed that where direct evidence of loss of damage was not possible, the loss for damages has to be remitted. Here, there were two methods adopted by the learned Arbitrator – One was the report of Rates and Costs Committee

of the Ministry of Irrigation and Power, Central Water and Power Commission. The other standards were the format followed by CPWD as regards rise in price of material and petroleum. Therefore, it was not as if the learned Arbitrator relied on some random figures to allow the claims of the Respondent.

No waiver

46. Merely because EOT had been granted without penalty and without escalation did not mean that the Respondent had waived off its claim in that regard. The waiver had to be express. The decision in ***Kailash Nath & Associates*** (*supra*) proceeded on the basis that paragraph 3 of Section 55 of the ICA applied. That is not the position in the instant case. As was rightly observed by learned Arbitrator, no such notice was mandated since time was not the essence of the Contract.

47. Clause 72.4 of the Contract merely stated that, *"No adjustment in Contract price shall be allowed."* As rightly held by the learned Arbitrator, the claim of the Respondent was more or less in the nature of damages and not as an adjustment of the Contract price. There was no waiver by the Respondent of its claims. It cannot be precluded from raising a claim on the basis of idle labour, tools and materials etc. In fact, there was no acceptance of the final bill by the Respondent. These are, again, factual findings which have not been disputed by NBCC.

No inconsistencies

48. The Court is unable to accept the contention on behalf of NBCC that there was inconsistency in the impugned Award as regards the failure by NBCC to contradict the evidence produced by the Respondent. All that the learned Arbitrator has recorded is that the parties agreed not to lead oral evidence. That did not preclude NBCC from producing sufficient material in the form of documentary evidence before the learned Arbitrator in support of its case. Even where it was unable to do so, it was not relieved from the burden of showing that the evidence was produced by the Respondent. This it could do either by cross-examining the witnesses, if any, or by producing documentary evidence itself. As it transpires, NBCC did neither in the instant case.

Interest

49. On the aspect of interest, again, the learned Arbitrator has given a very detailed reasons and has awarded either 18% or 12% *pendent lite* and future interest which can hardly said to be excessive or unreasonable. Consequently, the Court finds that even on this aspect, it has not been shown how any of the grounds under Section 34 of the Act has been attracted. The reliance placed by NBCC on the decision in ***Krishna Bhagya Nigam Ltd. v. G. Harishchandra Reddy*** (*supra*) and ***Om Prakash Gita Devi & Co. v. Food Corporation of India*** (*supra*) is misplaced. Under Section 31 (7) of the Act, the Respondent would be entitled to interest @ 18% per annum where the Contract itself is silent on that aspect. In the abovementioned cases, the Supreme Court exercised its powers under Article 142 of the Constitution to

reduce the rate of interest in the interests of justice. Therefore, the said decisions do not come to the aid of NBCC.

Conclusion

50. The Court is of the considered view that no grounds whatsoever have been made out for interference with the impugned Award of learned Arbitrator. Both the petitions are accordingly dismissed, but in the circumstances, with no orders as to costs.

S. MURALIDHAR, J

MARCH 31, 2017
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